IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PEITION NO.1672 OF 2004

Dr. Ganesh T. Panse & Anr. ...Petitioners.
Versus
Tata Memorial Hospital/
Tata Memorail Centre & Anr. ...Respondents.

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Mr. R.D. Bhat for the Petitioners.
Mr. S.K. Talsania with Mr. S.U. Uttam i/b. Mulla & Mulla for the Respondents.

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CORAM : DR. D.Y. CHANDRACHUD, J.

October 9, 2006.

ORAL JUDGMENT :

The First Petitioner is employed as a Scientific Officer with the First Respondent at Mumbai. On 22nd September 2000 a notice to show cause was issued to the First Petitioner to explain as to why disciplinary action should not be initiated against him for an act of misconduct. A charge sheet was issued to the First Petitioner on 9th February 2001 to which the First Petitioner submitted a reply on 26th February 2001. In the meantime, the First Petitioner was transferred from the Immuno Biochemistry Laboratory to the Pathology Department, a transfer which the Petitioners challenged in a complaint of unfair labour practices

(Complaint (ULP) 288 of 2001). The Petitioners also sought a stay of proceedings in pursuance of the charge sheet. Interim relief was refused. An enquiry was conducted into the charges levelled against the First Petitioner and the Enquiry Officer found that the charge of misconduct was duly established. Apprehending that his services would be terminated, the First Petitioner filed a second complaint of unfair labour practices under Item 1 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. Interim relief was refused in the complaint following which the matter was carried in a Writ Petition before this Court. The Learned Single Judge of this Court by an order dated 1st December 2003 noted that the First Petitioner herein had tendered an apology before the Enquiry Officer. This Court while disposing of the petition observed that while it was not inclined to interfere under Article 226 of the Constitution, it would be desirable if the First Respondent took into account the fact that the employee here had tendered his apology, while imposing the punishment. The First Petitioner undertook to withdraw the complaint filed by him before the Labour Court. In pursuance of the disciplinary proceedings and having regard to the observations contained in the order of the Learned Single Judge

dated 1st December 2003, the Second Respondent passed an order on 11th December 2003 reducing the First Petitioner to a lower stage in the pay scale from a basic pay of Rs.13,900/- to Rs.12,275/- per month for a period of three years. The order of punishment further directs that the First Petitioner shall not earn any increments of pay during the period of reduction and the reduction shall have the effect of permanently postponing the future increments of pay.

2. The order of the Second Respondent imposing a penalty upon the First Petitioner in the disciplinary proceedings was challenged in a complaint of unfair labour practices (Complaint (ULP) 24 of 2004), principally on the ground that the punishment which was imposed was not in accordance with the Model Standing Orders framed in pursuance of the Industrial Employment (Standing Orders) Act, 1946; the regulations of the First Respondent had not been notified by the appropriate Government under Section 13(B) and the order of the disciplinary authority imposed multiple punishments by both reducing the First Petitioner in the scale of pay and by a stoppage of his increments. The complaint was disposed of by the Industrial Court by an order

dated 5th April 2004. The Industrial Court held that the service regulations framed by the First Respondent were not required to be notified under Section 13(B) of the Industrial Employment (Standing Orders) Act, 1946 and, therefore, rejected the first of the two challenges to the order of the disciplinary authority. The Industrial Court, however, accepted the second challenge and held that the First Respondent was in error in both reducing the basic pay of the employee and withholding future increments. The Industrial Court, therefore, disposed of the complaint, observing that it would be open to the First Respondent to award any one of the punishments prescribed in the service rules. After the Industrial Court passed its order, the disciplinary authority passed a fresh order on 10th May 2004. The disciplinary authority while adverting to the order of the Industrial Court and to the apology that was tendered by the First Petitioner, imposed a lesser punishment by reducing the basic pay of the First Petitioner from Rs.13,900/- to Rs.12,275/- per month in the same scale of pay.

3. On behalf of the Petitioners, the order passed by the Industrial Court has been called into question on the following grounds: (i) The disciplinary enquiry and the imposition of

punishment was governed by the provisions of the Industrial Employment (Standing Orders) Act, 1946; (ii) Though the employer had in its Written Statement expressly raised the defence that the First Petitioner was not a workman within the meaning of Section 2 (s) of the Industrial Disputes Act, 1947, in the earlier complaint that was filed by the First Petitioner, Complaint (ULP) 288 of 2001, this defence had been given up and consequently, the employer was estopped from challenging the status of the First Petitioner as a workman; (iii) In any event, under Section 38(B) of the Bombay Shops and Establishments Act, 1948, the Model Standing Orders framed under the Act of 1946 were attracted; (iv) The Industrial Court was in error in holding that a notification of the service rules was not required under Section 13-B. In sum and substance, therefore, the contention of the Petitioners is that the punishment that has been imposed upon the First Petitioner was not in accordance with the provisions of the Model Standing Orders.

4. On behalf of the First Respondent, three submissions have been addressed before the Court: (i) The First Petitioner did not lead any evidence to establish that he was a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947

and an 'employee' under Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. This was a jurisdictional fact which was required to be established and in the absence whereof, the Industrial Court lacked jurisdiction to entertain the complaint; (ii) The proceedings before the Industrial Court in a Complaint under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, are of a summary nature as held by the Supreme Court in **Cipla Ltd v. Maharashtra General Kamgar Union**.[1] In the exercise of the summary jurisdiction, the Industrial Court was not justified in enquiring as to whether the Model Standing Orders applied, this being a matter which must await a formal adjudication on a reference; and (iii) The First Petitioner had willingly participated without demur in the disciplinary enquiry; he had accepted the misconduct by tendering an apology and the exercise of the jurisdiction under Article 226 of the Constitution is not warranted particularly since the final order of punishment dated 10th May 2004 which was passed after the order of the Industrial Court has not been questioned either before this Court or before any other competent forum under Industrial

1 (2001) 3 SCC 101

law. These submissions should now merit consideration.

5. The question as to whether the First Petitioner has established that he is a workman within the meaning of Section 2 (s) of the Industrial Disputes Act, 1947 goes to the foundation of the proceedings which have been instituted before the Industrial Court. Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, defines the expression "employee" *inter alia* to mean a workman as defined under Section 2(s) of the Central Act. The jurisdiction of the Industrial Court under Section 5(d) is to entertain a complaint relating to unfair labour practice (except those falling in Item 1 of Schedule IV where jurisdiction lies with the Labour Court). Section 26 defines "unfair labour practices" as those which are listed out in Schedules II, III and IV and under Section 27 there is a prohibition on an employer, employee or a Union engaging in unfair labour practices. The jurisdiction of the Labour Court or, as the case may be, of the Industrial Court, is based on the existence of an unfair labour practice. Where a person who moves the Industrial Court is an employee, the jurisdiction of the Industrial Court to entertain the complaint is determined by whether or not,

such a person meets the definition of the expression “employee” in Section 3(5); in other words, whether he is a workman as defined inter alia in Section 2(s) of the Industrial Disputes Act, 1947. Unless the employee who moves the Court fulfills the statutory requirement of the definition in Section 3(5), the jurisdiction of the Industrial Court to entertain the complaint will be lacking.

6. Section 2(s) of the Industrial Disputes Act, 1947 defines the expression “workman” in the following terms:

> “(s) “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
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> -(i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or
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> -(ii) who is employed in the police service or as an officer or other employee of a prison, or
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> -(iii) who is employed mainly in a managerial or administrative capacity, or
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> -(iv) who, being employed in a supervisory capacity draws wages exceeding one thousand six hundred

> rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

The judgment of the Constitution Bench of the Supreme Court in **H.R. Adhyanthaya vs. Sandoz (India) Ltd.**,[2] lays down that unless the employee fulfills the requirement of performing work of the nature or description adverted to in the substantive part of the definition in Section 2(s), it cannot be held that he or she is a workman. In other words, it is not enough or sufficient to establish that none of the exceptions to the definition of the expression "workman" are attracted. This principle emerges from the following summation of the law in the judgment of the Supreme Court:

> "Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation."

7. In the present case, the First Respondent had in the Written Statement filed before the Industrial Court raised a specific defence to the effect that the First Petitioner was not a workman

2 (1994) 5 SCC 737

under the Industrial Disputes Act, 1947 and, therefore, not an employee as defined under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The case of the First Respondent in para 3 of the Written Statement was that the First Petitioner was in a senior managerial administrative cadre with a monthly salary of Rs.24,000/- in the pay scale of Rs.10,000-325-15,200/-. The case of the workman in paragraph 3.15 of the Complaint was that in a prior complaint, Complaint (ULP) 288 of 2001, the employer had given up the objection that the First Petitioner was not a workman within the meaning of the Industrial Disputes Act, 1947. In the Written Statement the First Respondent contested the correctness of this averment contending that while in the earlier complaint the issue was not pressed, this did not mean that the employer had given up its right to raise the issue in an appropriate proceeding if considered necessary.

8. Now, the order of the Industrial Court that is impugned in these proceedings contains a specific recital to the effect that the First Petitioner had not led any evidence in support of the complaint. No evidence for that matter was led on behalf of the

Respondents. The Industrial Court recorded the statement that was made before it that the complaint should be disposed of on the basis of the documents on record since oral evidence was not required. The net result of the situation, therefore, was that the First Petitioner did not step into the witness box, nor did he lead any evidence to establish his status as a workman under Section 2 (s) of the Industrial Disputes Act, 1947 and consequently, as an "employee" under Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The burden of establishing that he is a workman clearly lay on the First Petitioner and he was on notice of the fact that his status as a workman was objected to on behalf of the employer. In **Mukesh K. Tripathi vs. Senior Divisional Manager, LIC,**[3] a Bench of three Learned Judges of the Supreme Court considered the body of law under the definition of the expression "workman" and by following the decision of the Constitution Bench in **Adhyanthaya** (supra), held that the onus lay on the person who asserted his status as a workman to establish that the work that he was performing, fell into one of the categories described in the definition contained in Section 2(s). In para 24 of the judgment, the Supreme Court held

3 2004 III LLJ 740

thus:

> "From a perusal of the award dated May 28, 1996 of the Tribunal, it does not appear that the appellant herein had adduced any evidence whatsoever as regard the nature of his duties so as to establish that he had performed any skilled, unskilled,manual, technical or operational duties. The offer of appointment dated July 16, 1987 read with the Scheme clearly proved that he was appointed as an apprentice and not to do any skilled, unskilled, manual, technical or operational job. The onus was on the appellant to prove that he is a workman. He failed to prove the same."

The same principle is reiterated in para 36 of the judgment:

> "A 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 must not only establish that he is not covered by the provisions of the Apprentices Act but must further establish that he is employed in the establishment for the purposes of doing any work contemplated in the definition."

9. In the present case, there is a striking absence of any oral evidence whatsoever on the part of the First Petitioner to establish his case that the work that he was performing fell into any one of the categories of work spelt out in Section 2(s) of the Industrial Disputes Act,.

10. The nature of the work that has been performed by the

First Petitioner finds elaboration in the pleading which has been submitted before the Court in these proceedings under Article 226 of the Constitution. In the synopsis that is appended to the petition, the First Petitioner describes his background, qualifications and the nature of the work as follows:

> "The Petitioner holds Ph.D degree in Biochemistry from Mumbai University. He is a life member of Endocrine Society of India and also an active member of New York Academy of Sciences of U. S. A. The Petitioner No.1 has distinguished service in research having published several papers and was engaged in research relating to early detection of Human Esophagus cancer."

In para 2.1 of the petition the First Petitioner describes the nature of his duties and functions as follows :

> " The Petitioner holds Ph.D degree from University of Bombay which he obtained in the year 1979 in Biochemistry at the age of 28 years. The Petitioner No.1 is life member of Endocrine Society of India from 1981. The Petitioner joined TMC as Scientific Officer "SC" (Tumor Marker Laboratory). Right from the initial appointment the First Petitioner has been working as a Research Scientist except for a brief period between April, 1987 to August, 1991, when he was required to perform routine clinical Biochemistry tests in Biochemistry lab. of TMC. Prior to joining TMC, the Petitioner worked as Research Assistant in Institute of Research in Reproduction. Thus by virtue of his qualification, training, experience and aptitude the Petitioner No.1 is not attuned to carry out routine technical work during the period 1987-91, hence, the Petitioner was transferred to Immuno Biochemistry

> Laboratory to carry out research work in August, 1991. The Petitioner No.1 has excellent record in research work having contributed several research papers which have been published in highly appreciated professional journals internationally. On 19.12.1994 the Petitioner No.1 was elected as active member of New York Academy of Sciences of U.S.A. and continues to be so. The Petitioner No.1's biographical sketch was published in globally recognized Marquis “Who's who in the world” 14th Ed. 1997. During the period from August 1991 to August, 2000 the Petitioner No.1 carried out six research Projects and has to his credit five publications between 1st September 1991 to 31st August, 2000. After his promotion as Scientific Officer (SD), the Petitioner was carrying out research work in cancer related field viz: (i) Raising Monoclonal anti bodies (2) Radio Immuno Assay (RIA) for early detection of Human Esophagus cancer. The work related to first category involving mainly biology came to an end on 31.8.1998 on retirement of Dr. J.S. Nadkarni who was senior most scientist in the department. The 2nd research project was personally handled by the 1st Petitioner. If this project was continued it would have led to earlier detection of cancer of esophagus which would have helped early treatment and cure to innumerable human beings suffering from Esophagus cancer which is in large number in India. The project work itself was sanctioned by scientific Advisory Committee of TMC in May, 1994. Although the funds allocated were exhausted the Petitioner carried out further research work on his own initiative by gathering material from various sources.”

Ex-facie, the nature of the work which the First Petitioner himself has stated that he was performing cannot be held to fulfill the description contained in Section 2(s). Section 2(s) requires that the person must be engaged to do any manual, unskilled, skilled,

technical, operational, clerical or supervisory work for hire or reward. In **Adhyanthaya** (supra), the Constitution Bench held that the expression “skilled” in the context in which it appears in Section 2(s) must “be construed as ejusdem generis and thus construed, would mean skilled work whether manual or non-manual which is of a genre of the other types of work mentioned in the definition.” Hence, the work of promotion of sales of a product or services of the establishment was held to be distinct from and independent of the types of work covered by the said definition. The contention that medical representatives were employed to do skilled work within the meaning of the said definition, was rejected. As regards the 'technical' nature of the work, it has held to have been expressly rejected by the Court in the **Burmah Shell** case.

11. The First Petitioner admits in terms that by virtue of his qualification, training, experience and aptitude, he was not attuned to carry out routine technical work. The First Petitioner has himself adverted to a series of research projects that he was involved in, some of them on the cutting age of scientific knowledge. He admits to the initiative which his job entailed: even after funds for the research project were exhausted, “the Petitioner carried out

further research work on his own initiative by gathering material from various sources". The duties and functions of the First Petitioner as described by the First Petitioner himself in para 2.1 of the petition, cannot be regarded as falling in the description contained in the substantive part of Section 2(s).

12. On behalf of the Petitioners, however, it has been submitted that the Respondents are estopped from denying the status of the First Petitioner as a workman. The plea of estoppel is based on the premise that when the First Petitioner filed a complaint of unfair labour practices being Complaint (ULP) 288 of 2001, for challenging his transfer to the Pathology Department from the Immuno Biochemistry Laboratory, the Respondents proceeded to contest the complaint on merits and that the order of the Industrial Court dated 1st December 2003 recorded that a purshis had been filed by the Respondents stating that they would not press the issue in regard to the status of the First Petitioner as an employee. The observations contained in the order of the Industrial Court while dismissing the complaint challenging the transfer of the First Petitioner from one department to another cannot, in my view, operate to foreclose a determination in a subsequent

complaint of whether the First Petitioner fulfills the requirement of the definition in Section 2(s) of the Industrial Disputes Act, 1947. The question as to whether a person who moves the Industrial Court in a complaint of unfair labour practices is an "employee" within the meaning of Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, is a jurisdictional fact which must be demonstrated to exist before the Industrial Court can exercise jurisdiction on a complaint of unfair labour practices. The provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, have been held in the judgment of the Supreme Court in **Cipla** to be of a summary nature and character. The principle is reiterated in subsequent decisions, including the decision in **Sarva Shramik Sangh vs. Indian Smelting.**[4] Where a person who moves the Industrial Court is not an "employee", the Industrial Court cannot assume jurisdiction since the existence of jurisdiction depends upon the demonstration of a jurisdictional fact, namely, the grievance that the complainant is an "employee". The question as to whether the definition of the expression "workman" under Section 3(5) is fulfilled, has been held by the Supreme Court

4 (2003) 10 SCC 455

in **Sonepat Cooperative Sugar Mills Ltd. vs. Ajit Singh**[5] to be so fundamental as to override considerations of procedural principles such as estoppel, waiver and res judicata. The Supreme Court followed the earlier decision in **Ashok Leyland vs. State of Tamil Nadu**,[6] where the Court had held as follows :

> "118. The principle of res judicata is a procedural provision. A jurisdictional question, if wrongly decided, would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or res judicata."

The judgments of the Supreme Court in **Ashok Leyland** and **Sonepat** provide a clear answer to the submission based on the ground of estoppel that has been urged on behalf of the First Petitioner. The question as to whether the complainant was employed as a workman went to the root of the jurisdiction of the Industrial Court and unless this jurisdictional fact is established by cogent pleading and convincing proof the jurisdiction of the Industrial Court to entertain the complaint is manifestly lacking. The judgment of the Learned Single Judge of this Court in **S. A.**

5 (2005) 3 SCC 232
6 (2004) 3 SCC 1

Sarang vs. W.G. Forge & Allied Industries Ltd. [7] which was relied upon by Counsel for the Petitioners was not in the context of a complaint under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, but in the background of an award rendered in a reference to adjudication under Section 10 of the Industrial Disputes Act, 1947. That apart, the facts of that case show that the employer had issued a series of show cause notices and chargesheets to the workman under the Model Standing Orders and it was in that context that this Court held that if an employer "continuously and consistently" proposes and takes action against its employee on the footing that he is covered by the Model Standing Orders (thereby implying that the employee is a "workman" within the meaning of the Industrial Disputes Act, 1947) then the employer must be estopped from denying the said fact when a dispute regarding the dismissal of the employee finally lands up before an industrial adjudicator. The rule of estoppel which has been relied upon in the judgment of a Learned Single Judge of this Court in **Sarang**' s case is a rule of procedure which cannot override a question of jurisdiction in the first place as held by the Supreme Court in the judgment in

7 1996 I LLJ 67

Sonepat Co-operative Sugar Mills. This Court was not concerned in **Sarang** with the exercise of the summary jurisdiction under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, and in any case, the facts in that case are clearly distinguishable.

13. On behalf of the First Petitioner, in the affidavit in rejoinder, reliance has been placed upon a letter dated 23rd November 2000 written by the Professor and Head of Pathology, assigning the First Petitioner certain duties upon his resumption of work on 28th November 2000 in the Biochemistry Section. In my view, this is neither an appropriate nor a proper stage for the Petitioners to do so. When the Industrial Court was moved, it was for the Petitioners to establish a jurisdictional fact, which they failed to do.

14. The net result of the aforesaid discussion is that the Petitioners have failed to establish that the First Petitioner was a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and hence an 'employee' within the meaning of Section 3(5) of the Maharashtra Recognition of Trade Unions and

Prevention of Unfair Labour Practices Act, 1971. The applicability of the provisions of the Industrial Employment (Standing Orders) Act, 1946 would depend upon whether the person concerned is a workman under Section 2(s) of the Industrial Disputes Act, 1947. In the absence of any evidence on the part of the Petitioners who moved the Industrial Court, it would have to be held that a jurisdictional fact was not established.

15. In these circumstances, it is not necessary for this Court to exercise the jurisdiction under Article 226 of the Constitution in a petition filed on behalf of the Petitioners herein. Before concluding, however, it would be necessary to clarify that the observation contained in the order of the Industrial Court to the effect that the service rules are not required to be notified under Section 13B of the Industrial Employment (Standing Orders) Act, 1946 is not reflective of the correct position in law. In **The U.P. State Electricity Board v. Hari Shankar Jain,** 1978 LAB I.C. 1657, the Supreme Court has interpreted the provisions of Section 13-B and in a judgment thereafter of a Learned Single Judge of this Court in **Divisional Forest Officer, Gadchiroli vs. Madhukar**

Ramaji Undirwade,[8] it has been held that the service rules are required to be specifically notified by the appropriate Government with reference to Section 13-B. Fairly, it must be stated that this position in law has not been disputed on behalf of the Respondent by Counsel. For the reasons indicated, I am of the view that no case has been made out to exercise the jurisdiction under Article 226 of the Constitution. However, while disposing of this petition, it is clarified that it would be open to the Petitioner herein to seek such remedies as are available in law. The petition is accordingly dismissed.

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8 1995 II CLR 292